



Criminal Procedure *in the* **Syariah Courts**

Shamrahayu A Aziz

SWEET & MAXWELL ASIA

Criminal Procedure in the Syariah Courts

Shamrahayu A Aziz

LLB, LLB Shariah (IIUM), MCL (IIUM), DSLP (IIUM), PhD (IIUM)
Associate Professor, Ahmad Ibrahim Kulliyah of Laws
International Islamic University Malaysia



~~Published~~ in 2011 by
Thomson Reuters Malaysia Sdn Bhd (464942-H)
(trading as Sweet & Maxwell Asia)
No 17, Jalan PJS 7/19, Bandar Sunway
46150 Petaling Jaya, Selangor, Malaysia

Affiliated Companies

AUSTRALIA

Thomson Legal and Regulatory Limited
100 Harris Street
Pyrmont, Sydney
Australia, NSW 2009

CANADA

Carswell
One Corporate Plaza
2075 Kennedy Road
Scarborough, Ontario M1T 3V4

HONG KONG

Thomson Reuters Hong Kong Ltd
10/F, Cityplaza 3
Taikoo Shing
Hong Kong

SINGAPORE

Thomson Reuters Corporation Pte Ltd
18 Science Park Drive
Singapore 118229

NEW ZEALAND

Brookers
PO Box 6343
Auckland

UNITED KINGDOM/EUROPE

Sweet & Maxwell Ltd
100 Avenue Road
London NW3 3PF

UNITED STATES OF AMERICA

West Group
PO Box 64526
St Paul, Minnesota 55164-052

ISBN 978-967-5040-73-3

All rights reserved. No part of this publication may be reproduced or transmitted in any form or by any means, or stored in any retrieval system of any nature without prior written permission, except for permitted fair dealing under the Copyright Act 1987. Application for permission for other use of copyright material including permission to reproduce extracts in other published works shall be made to the publisher. Full acknowledgement of the author, publisher and source must be given.

The author has asserted her moral right under the Copyright Act 1987,
to be identified as the author of this publication.

© Shamrahayu A Aziz

Cover design by Edward Goh

Printed by Swan Printing Sdn Bhd (274710-X)
Lot 5249, Jalan BS 7/1, Kawasan Prindustrian Bukit Serdang
43000 Seri Kembangan, Selangor

Recommended Stockists

Australia

Thomson Legal and Regulatory
Limited
Brisbane, Sydney, Melbourne,
Perth

Canada and USA

Carswell
Ottawa, Toronto, Calgary,
Montreal, Vancouver

Hong Kong

Thomson Reuters Hong Kong Ltd
Hong Kong

India

NM Tripathi (Private) Ltd
Bombay
Eastern Law House (Private) Ltd
Calcutta

MPP House
Bangalore

Universal Book Traders
Delhi

Indonesia

Pt Ina Publikatama
Jakarta

Japan

Kinokuniya Co Ltd
Tokyo

Kokusai Shobo Ltd
Tokyo

Malaysia

Thomson Reuters Malaysia Sdn Bhd
trading as
Sweet & Maxwell Asia

New Zealand

Brookers
Auckland

Pakistan

Pakistan Law House
Karachi, Lahore

Philippines

MegaTEXTS Phil Inc
Cebu

Singapore

Thomson Reuters Corporation Pte Ltd
trading as
Sweet & Maxwell Asia

South Korea

Information & Cultural Korea
Seoul

Thailand

Booknet Co Ltd
Bangkok

Kinokuniya Bookstores
Bangkok

UK/Europe/Middle East/Africa
Sweet & Maxwell Ltd
London

Preface

Criminal procedure is the branch of law containing the rules governing the administration of criminal justice. It commences with investigation and ends with discharge or acquittal, or with conviction and imposition of sentence and punishment against the accused/convicted persons. The law aims to ensure a proper, fair and just process in the enforcement of criminal law. Islamic law has the same concept with specific rules governing the administration of criminal justice. Although Islamic criminal procedure contains sufficient basis and conceptual ideas supported by the primary and secondary sources of Islamic law, it is historically less developed compared to other branches of law.

In Malaysia the criminal process became more comprehensive after the enactment of a specific set of laws known collectively as the Syariah Criminal Procedure law. The passing of the law was timely as criminal cases and issues on human rights were regularly taking center stage.

Under the federal scheme of the distribution of legislative powers between the Federal and the State governments as provided for by the Malaysian Federal Constitution, the Syariah legislation in Malaysia (including the Syariah Criminal Procedure law), is a state matter. Thus, beginning 1983, the States started to enact specific Syariah Criminal Procedure law, when Kelantan took the lead by enacting the Syariah Criminal Procedure Code in 1983 (En 9/1983 – now repealed by En 9/2002). At present, all Malaysian States (including the three Federal Territories) have enacted and adopted their own Syariah Criminal Procedure law. The current Syariah Criminal Procedure legislation provides for a better and more comprehensive Syariah criminal procedure system as compared to the earlier provisions which were found under the Administration of Islamic Law of the States.

Given the brief background of the law in Malaysia, this book *Criminal Procedure in the Syariah Courts* attempts to describe the applicable criminal procedure in the Syariah courts and the contents of the Syariah Criminal Procedure law. Much of this book is concerned with the understanding of the provisions of law and their application. In other words, this book explains the basic idea and practice of the law in a simple narrative style of presentation to make the ideas easily understood. It is written with the aim of providing introductory but essential reading for students and those interested in the Islamic administration of criminal justice, though

some other crucial issues such as the rights of accused persons are briefly addressed. The book discusses various aspects of the Syariah criminal process with constant reference to relevant provisions of statutory law and Syariah case law.

The investigation process is always a point of contention from which human right issues often arise. This book explains the nature and concept of investigation, including search, seizure, arrest, detention and other related procedures from the Islamic point of view with regular reference to the Syariah sources. It is submitted in this book that although investigation is allowed in Islam, it is an exception to the general concept of Islamic principles which emphasise the importance of respect for human dignity and privacy. Investigation should thus always be guided by fundamental Islamic spirit.

The publication of this book comes at a crucial time when various incidents have taken place that could eventually turn out to be the defining moment which clarifies the powers of religious enforcement officers in the enforcement of Islamic criminal law in the country. Issues at hand are becoming more complicated and indeed we need a “starter” to interpret, to discuss and to further develop and improve the Syariah Criminal Procedure law. This book is the first of its kind in the country although the author has written a number of journal articles on the subject.

Shamrahayu A Aziz
July 2011

Acknowledgements

I wish to thank those who have assisted me in various ways that led to the publication of this book. First and foremost, I would like to thank all my undergraduate and postgraduate students for their support and encouragement. Some ideas in this book have been generated through class discussion and interaction with the students. I am very much indebted to them.

It is a pleasure to extend my sincere gratitude and thanks to the International Islamic University Malaysia. In particular, I would like to extend my gratitude and thanks to the Rector, Ybhg Prof Dato' Sri Dr Syed Arabi Aidid, for providing me with comfortable facilities in the University which were conducive to my writing activities. Similarly, my gratitude and thanks are due to Prof Dr Mohd Akram Shair, the Dean, Ahmad Ibrahim Kulliyyah of Laws (AIKOL), and Dr Badruddin Ibrahim, Head of Islamic Law Department, AIKOL.

The publishers, Sweet and Maxwell Asia and the capable editors, Mohd Zakry and Kevin Ooi, merit a mention here for their patience and perseverance. They are instrumental to this publication. My sincere thanks to the editorial and production teams for the preparation of the book cover and the tables of cases and statutes.

I wish to convey my earnest appreciation to my family for their sacrifices. I have deprived them of their entitlement to my attention and affection while I was engaged with my computer in preparing the manuscript. I cannot repay all that except by loving them all and may Allah give them strong faith and good health.

Last but not least, special thanks to all my colleague and friends, in particular Prof Dr Abdul Aziz Bari, Assoc Prof Dr Farid Sufian Shuaib and Asst Prof Dr Mohd Hisham Mohd Kamal, who have always given me moral support in my academic activities.

Shamrahayu A Aziz
Gombak
July 2011

Contents

<i>Preface</i>	vii
<i>Acknowledgement</i>	ix
<i>Glossary</i>	xvii
<i>Abbreviations</i>	xxi
<i>Table of Cases</i>	xxiii
<i>Table of Statutes</i>	xxv

Introduction	1
---------------------------	---

Chapter 1

General Discussion on Islamic Judiciary and Criminal Procedure	5
Principles of judiciary in Islam	7
Early courts administration in Islam	10
Principles of <i>al-Qadha' al-Qadhial Qadhi</i> and the letter of Umar al-Khattab (RA)	12
A general perspective on Syariah Criminal Procedure	16

Chapter 2

Syariah Courts In Malaysia – A Brief Overview	17
Constitution of Syariah Courts	17
Appointment of judges and registrars in Syariah Courts	18
Appointment of syariah prosecutors and religious enforcement officers	19
Appointment of syari'e counsel	20
Police officers and enforcement of Islamic Criminal Law	21
Criminal jurisdiction of the Syariah Courts and the Federal Constitution	24
Syariah Courts Criminal Jurisdiction	28
Criminal Jurisdiction of Syariah High Court	28
Criminal Jurisdiction of Syariah Subordinate Court	29
Criminal Jurisdiction of Syariah Appeal Court	29
Syariah Courts and Article 121(1A)	30
The applicable Criminal Procedure Law in Syariah Courts	32
An overview on Syariah Criminal Procedure Act	33
Salient features of the Syariah Criminal Procedure Act	36
Provisions on irregularities	37

Chapter 3

General Principles on Investigation	39
Investigation process and human dignity	39
Investigation under the Syariah Criminal Procedure Act.....	44
Who shall conduct investigation	44
Commencement of investigation.....	45
Information to religious enforcement officers	47
Complaint to a judge	48

Chapter 4

Arrest	51
Arrest under the Syariah Criminal Procedure Act.....	52
Types of arrest.....	53
Arrest in seizable and non-seizable offences	53
Distinction between summons and warrant of arrest	54
Arrest with warrant	56
When to issue a warrant of arrest?	57
Executing warrant of arrest and dealing with arrested person	57
Arrest without warrant	58
Who may arrest without warrant	58
Who may be arrested without warrant	60
Dealing with person arrested without warrant	62
Detention during investigation.....	63
Arrest and accompanying rights	65

Chapter 5

Search, Seizure and Examination of Witnesses	69
Search of body	69
Search of premises	70
Provisions regarding search warrant	72
Seizure	74
Examination of witnesses	75

Chapter 6

Initiating Criminal Proceedings, Framing a Charge and Prosecution.....	81
Taking cognisance of offences	81
Sanction to prosecute.....	85
Who may prosecute	85
Compelling the appearance of the accused person in court.....	88
Summons to appear.....	89
Warrant of arrest	92
Charge.....	93
Framing a charge	94
Rules governing the form of charges	94

Amendment of charge.....	96
Errors and irregularities in the charge.....	97
Filing criminal case in court.....	97

Chapter 7

Trial	99
Adversarial and inquisitorial systems.....	99
Jurisdiction regarding trial.....	101
Overview on trial procedure.....	104
i. "Accused".....	106
ii. Preliminary objections and preliminary applications.....	107
iii. Prosecution does not have to open the case.....	107
iv. Charge and "understand the charge".....	108
v. "Pleads guilty".....	109
vi. Charge as originally framed or as amended (s 96(b)).....	112
vii. "... refuses to plead or does not plead or claims trial".....	112
viii. Evidence at trial.....	112
ix. "No case to answer" and "a case to answer".....	114
x. Defence's case.....	115
xi. "Discharge" and "acquittal".....	117
xii. Taking evidence during trial.....	118
xiii. Witnesses.....	118
xiv. End of trial.....	119
xv. Rights of accused during criminal trial.....	120
xvi. Powers and duties of courts during criminal trial.....	122
xvii. Powers and duties of prosecutor and defence counsel during criminal trial.....	124
xviii. Change of judge during trial.....	124
xix. Transfer of criminal case.....	125
xx. Adjournment of case.....	126

Chapter 8

Judgment, Sentencing, Appeal and Revision	129
Judgment and sentencing.....	130
Judgment writing.....	133
Kinds of punishment.....	134
Mitigating and aggravating factors.....	136
Appeal and revision.....	140
Appeal procedure.....	140
Appeal to Syariah High Court.....	141
Appeal to Syariah Appeal Court.....	144
Some issues regarding appeal.....	144
Stay of execution.....	144
Appeal against conviction based on confession.....	144
Can appeal against a Syariah Subordinate Court decision be made straightaway to the Syariah Appeal Court?.....	145
Revision.....	146

Appendices

Appendix A

Administration of Islamic Law

(Federal Territories) Act 1993 (Act 505)	155
Section 38. Request for opinion from the Mufti	155
40. Constitution of Syariah Courts	155
41. Appointment of Chief Syariah Judge	155
42. Appointment of Judges of the Syariah Appeal Court.....	156
43. Appointment of Judges of the Syariah High Court.....	156
44. Appointment of Judges of Syariah Subordinate Courts.....	157
45. Registrars	157
46. Jurisdiction of Syariah High Court.	157
47. Jurisdiction of Syariah Subordinate Court.....	158
48. Appeal to Syariah High Court	159
49. Application for leave to appeal	160
51. Supervisory and revisionary jurisdiction of the Syariah High Court.....	160
52. Jurisdiction of Syariah Appeal Court.....	160
53. Supervisory and revisionary jurisdiction of the Syariah Appeal Court	161
54. Composition of the Syariah Appeal Court.....	161
55. Decision by majority	161
56. Continuation of proceedings in Syariah Appeal Court notwithstanding absence of Judge	161
57. Appeal rules	162
58. Appointment of Syariah Prosecutors and Religious Enforcement Officers	162
59. Peguam Syarie.....	163

Appendix B

Syariah Court Evidence

(Federal Territories) Act 1997 (Act 561)	167
Section 3. Interpretation	167
17. <i>Iqrar</i> defined.....	167
18. Admissibility of <i>iqrar</i>	167
87. Manner of giving evidence.....	168
89. Order of production and examination of witnesses	168
90. Court to decide as to admissibility of evidence	169
91. Examination-in-chief, cross-examination and re-examination.....	169
92. Order of examinations and direction of re-examination.....	170
93. Cross-examination of person called to produce a document.....	170
94. Witnesses to character.....	170

Section 95.	Leading questions.....	170
96.	When leading questions may not be asked	170
97.	When leading questions may be asked	171
98.	Evidence as to matters in writing.....	171
99.	Cross-examination as to previous statements in writing	172
100.	Questions lawful in cross-examination.....	172
101.	Court to decide when question shall be asked and when witness compelled to answer	172
102.	Question not to be asked without reasonable grounds.....	173
103.	Procedure of Court in case of question being asked without reasonable grounds	174
104.	Indecent and scandalous questions	174
105.	Questions intended to insult or annoy	174
106.	Exclusion of evidence to contradict answers to questions testing veracity.....	174
107.	Question by party to his own witness	175
108.	Impeaching credit of witness.....	175
109.	Questions tending to corroborate evidence of relevant fact admissible.....	176
110.	Former statements of witness may be proved to corroborate later testimony as to same fact.....	176
111.	What matters may be proved in connection with proved statement which is <i>qarinah</i> under s 20 or 21	176
112.	Refreshing memory	177
113.	Testimony to facts stated in document mentioned in s 112	177
114.	Right of adverse party as to writing used to refresh memory	177
115.	Production of documents and their translation	177
116.	Giving as evidence of document called for and produced on notice	178
117.	Using as evidence of document production of which was refused on notice	178
118.	Judge's power to put questions or order production.....	178
119.	Determining that a witness is ' <i>adil</i>	179
120.	Witness to be examined through parties related to him.....	179
121.	Secret examination.....	179
122.	Number of secret examiners	180
123.	Open examination	180
124.	Testimony in open examination forms part of <i>syahadah</i>	180
125.	When witness need not be examined	180

Section 126. Denial (<i>ta'n</i>) over a witness.....	181
127. When findings of witness examiners differ	181
128. Dead or missing witness.....	181
129. When witness required to take the oath.....	181

Appendix C

Syariah Court Civil Procedure

(Federal Territories) Act 1998 (Act 585)	185
---	------------

Section 102. Request for issue of subpoena	185
103. Number of persons in subpoena	185
104. Subpoena to produce documents.....	185
105. Amendment of subpoena.....	185
106. Service of subpoena.....	186
107. Duration of subpoena	186
108. Court records.....	186
109. Attendance of prisoner as witness or party	186
110. Tender of expenses	186
111. Affidavit of service of subpoena.....	187

<i>Index</i>	189
--------------------	-----